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Attorney Docket No. RPC 0557 PUS

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123

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

APPLICANT: William P. Apps

EXAMINER: Castellano

SERIAL NO.: 09/780,073

GROUP ART UNIT: 3727

FILED: February 9, 2001

FOR: NESTABLE CAN TRAY WITH CONTOURED WALL STRUCTURE

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**REPLY BRIEF**

Dear Sir:

Appellant files this Reply Brief in response to the Examiner's Answer mailed April 21, 2004.

**CERTIFICATE OF MAIL**

I hereby certify that the enclosed Reply Brief (in triplicate) is being deposited with the United States Postal Service as First Class Mail, postage prepaid, in an envelope addressed to Mail Stop Appeal Brief - Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450 on June 18, 2004.

  
Konstantine J. Diamond

### **Amendment with Appeal**

Appellant's Amendment with Appeal amending only claim 22 has been entered. The Claim Appendix at the end of this Reply Brief reflects the entry of the "Amendment with Appeal." This removes the §112 Rejection of claim 22.

### **Argument**

Appellant submits specific arguments in response to particular statements in the Examiner's Answer and to point out where the Examiner has not indicated any disagreement with Appellant regarding certain claims. This is intended to be in *supplement* to Appellant's Appeal Brief, and Appellant has made an effort not to repeat the arguments from the Appeal Brief here.

#### **I. Anticipation over Carroll**

##### **Group A) Claims 6, 8, 9 and 12**

The Examiner has clarified for the first time that he is referring solely to the "trapezoidal portions" of the outer zig-zag<sup>1</sup> as the "columns" recited in claim 6. (Examiner's Answer, page 5). The Examiner refers to the inner zig-zag as "the band." (Final Rejection mailed April 2, page 2). With this clarification, it is even clearer that claim 6 is not anticipated by Carroll.

Claim 6 recites that the band is "connected to the floor structure by said columns." On the right front and right rear walls as oriented in Figure 1 of Carroll, reproduced below, the "trapezoidal portions" of the outer zig-zag do not connect the inner zig-zag to the floor. In fact, these trapezoidal portions of the outer zig-zag do not connect to the floor at all, because the inner zig-zag is between the outer zig-zag and the floor.

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<sup>1</sup> The terms "inner zig-zag" and "outer zig-zag" are the Examiner's and are not in the Carroll patent. The Carroll patent is a design patent.

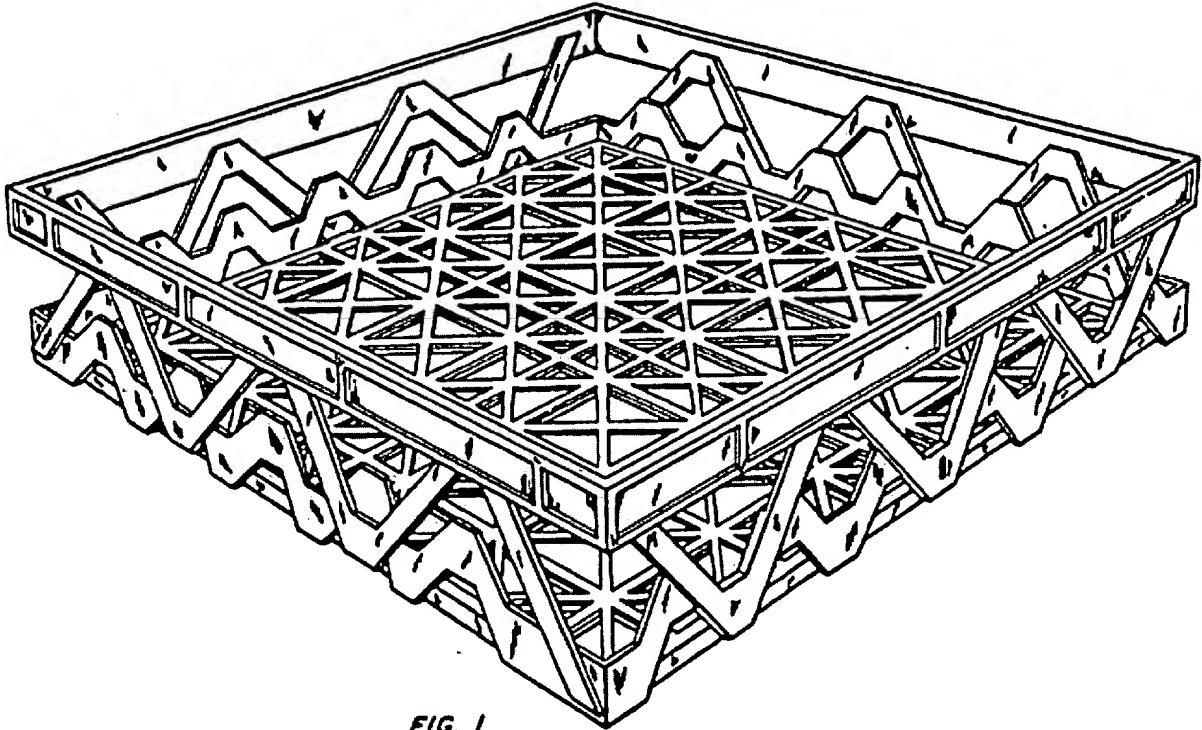


FIG. 1

Carroll Figure 1 "Bakery Tray"

On the left front and left rear walls, the "trapezoidal portions" do not connect to the inner zig-zag (it's unclear if they attach to the floor).

Additionally, as explained in the Appeal Brief, the trapezoidal portions are not generally perpendicular to the floor. The Examiner argues that they are perpendicular to the floor as seen from above, but the Examiner does not allege that they are perpendicular to the floor as seen from the side. "Generally perpendicular" to a plane (the floor structure) would mean perpendicular as seen from both of these angles, otherwise the "column" is not generally perpendicular to the floor.

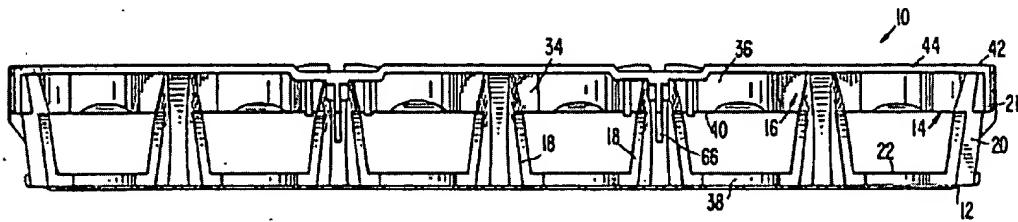
Therefore, Carroll does not anticipate claims 6, 8, 9 and 12.

## II. Anticipation by Apps '925

The Examiner has rejected claims 6-18 and 21-26 under 35 U.S.C. §102 as being anticipated by Apps '925 (also the inventor of this application) (U.S. Patent No. 5,323,925).

Groups B, C and D) Independent Claims 6, 13 and 22 (and claims dependent therefrom)

The Examiner argues that the post 20 of Apps '925, shown in Figure 5, reproduced below, is "a thin strip of flexible material used to encircle and bind one object or to hold a number of objects together." (Examiner's Answer, page 6). However, even if the post 20 is considered "a thin strip," it does not "encircle or bind" any objects. Moreover, even if the post 20 were a "band" as the Examiner argues, each column would be a separate band, not part of the rail 16. In particular, Appellant disagrees with the Examiner's referral to the rail 16 in combination with the post 20 as "the band." The Examiner's argument does not support that the rail 16 and post 20 can be considered in combination, but only that the post 20 is its own band, which would not meet the terms of the claims.



Apps '925, Figure 5

Additionally, even if the rail 16 and post 20 in combination were "the band," this combination is not "contoured downwardly along the side portions between the parallel portions to form a band central portion that directly connects to the floor structure at the side portions of said tray," as required by claim 6. Certainly, the post 20 extends downwardly as it projects from the rail 16, but this is not the same as "contoured downwardly." If the rail 16 and posts 20 in combination were considered "the band," then there are no "columns" connecting the band to the floor, as required by claim 6.

Group C)

The Examiner did not address claim 13, which specifies:

an uppermost edge of the band side detail is an uppermost surface of the wall structure at the band side detail and wherein the upper edge of the band side detail at each band side detail is below an uppermost surface of the side and end portions of the band

As is not disputed by the Examiner, and as can be seen in Apps '925, the upper edge of the rail 16 is the same height throughout the entire periphery of the crate.

Group E) Claim 7

The Examiner did not address Claim 7, which specifies that the band central portion has a top edge to receive a mating bottom edge of a band central portion of a like tray nested thereabove. For the reasons stated in Appellant's Appeal Brief, and as is not disputed, claim 7 is independently patentable.

Group F) Claim 14

The Examiner did not address claim 14, which specifies that "one of the side portions of the band is contoured downwardly and one of the end portions of the band is contoured downwardly so as to converge together to define a band corner portion." For the reasons stated in Appellant's Appeal Brief, and as is not disputed, claim 14 is independently patentable.

Group G) Claims 10 and 17

The Examiner did not address claims 10 and 17, which specify a rib on an exterior surface of at least one band corner portion, and a platform at an upper edge of a corresponding band corner portion for supporting the rib of an adjacent above-nested tray. For the reasons stated in Appellant's Appeal Brief, and as is not disputed, claims 10 and 17 are both independently patentable.

III. Obviousness over Carroll

Group H) Claims 1-10, 12-15, 17-19 and 21-28

The Examiner has rejected claims 1-10, 12-15, 17-19 and 21-28 as obvious over Carroll. Appellant's Appeal Brief adequately details why the Examiner's proposed motivation for the modification to the Carroll bakery tray is insufficient. Additionally, the Examiner's proposed motivation in the Examiner's Answer is so broad as to render obvious any selective re-shaping of a prior art apparatus to meet the terms of a claim.

IV. Obviousness over Apps '925 in view of David

Group I) Claim 8

The Examiner offers no motivation for modifying the posts 20 of Apps '925 to be V-shaped. That failure to provide a *prima facie* case of obviousness, of course, is sufficient grounds for this rejection to be reversed.

Additionally, the Examiner's proposed modification would be contrary to the Examiner's assumption for motivation with respect to Carroll, above, since changing the posts 20 to be V-shaped would increase the weight of the Apps '925 tray. In the obviousness rejection over Carroll, the Examiner assumes that any portion of a tray may be removed to reduce weight. Here, in contrast, the Examiner says it is obvious to change a single post to be V-shaped. However, the Examiner offers no motivation for such a change. Therefore, claim 8 is patentable over Apps '925 in view of David.

V. Obviousness over Carroll in view of Apps '925

Group J) Claims 11, 16 and 20

The Examiner has proposed even more drastic modifications to the "Bakery Tray" of Carroll in order to reject claims 11, 16 and 20. Because the Examiner's previous modification (to reject the claims from which claims 11, 16 and 20 depend) was to remove the entire outer zig-zag band that extends above the inner zig-zag band, the outer band cannot stack on top of the outer band of a lower tray. As can be seen in Figures 7 and 8 of Carroll, if all of the outer band above the inner band were removed, like trays would stack with the inner band resting on the inner band of the lower tray, with no contact between outer bands. This is in part because the outer band does not extend as far down as the inner band.

Again, the Examiner offers no motivation to support the wholesale re-shaping of James Carroll's "Bakery Tray" that the Examiner says is obvious.

VI. Double-Patenting over U.S. Des. 404,204

Group K) Claims 1-28

Under the Examiner's proposed theory, double patenting rejections of utility patent applications over corresponding design patents would be routine, as they are

routine for this Examiner.<sup>2</sup> However, when properly applied, "[d]ouble patenting is rare in the context of utility versus design patents." *In re Thorington*, 418 F.2d 528, 536-37, 163 USPQ 644, 650 (CCPA 1969).

#### VII. Double-Patenting over U.S. Pat. No. 6,186,328

##### Group L) Claims 1-28

The Examiner has rejected all of the pending claims under the judicially-created doctrine of obviousness-type double patenting over related patent U.S. Patent No. 6,186,328. Even though Appellant has numerous times requested a *prima facie* case, the Examiner indicates only that there are "minor obvious modifications" without even identifying them. There is no *prima facie* case, and this rejection should be reversed.

#### VIII. Rejection under Section 112

Claim 22 has been amended, thereby removing that issue from appeal.

Appellant had no objection to making the obvious amendment to claim 13 implicitly suggested by the rejection, but the refusal to enter that amendment has boosted this trivial issue to appeal. Appellant's willingness to amend is not an admission that the claim is indefinite. Appellant was simply trying to avoid wasting the Board's time. Despite Appellant's efforts, this rejection is still on appeal.

Contrary to the rote recitation of an indefiniteness rejection in the Examiner's Answer, in the context of claim 13, the "upper edge of the band side detail" can only be the same as the "uppermost edge of the band side detail." The "band side detail" is a portion of a "band." A "band" cannot have an "upper edge" other than its "uppermost edge." Therefore, claim 13 is not indefinite.

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<sup>2</sup> See page 15 of Substitute Appeal Brief mailed September 22, 2004 regarding the Examiner's routine rejection of utility applications over design patents.

**CLOSING**

For the above reasons, claims 1-28 are patentable.

No fees should be due. However, if any other fees or extensions are due,  
please charge Deposit Account No. 50-1984.

Respectfully submitted,

Dated: June 18, 2004

A handwritten signature in black ink, appearing to read 'Konstantine J. Diamond', written over a horizontal line.

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## REVISED CLAIMS APPENDIX

1. A low depth nestable tray for containers, said tray having a floor structure with a floor top surface, a floor bottom surface, and a plurality of container support areas on the floor top surface, wherein the improvements comprise:

a low depth wall structure comprising a plurality of columns arranged along the periphery of the floor structure, and further comprising a band having side and end portions spaced above the floor structure and connected to the floor structure by said columns to form a unitary construction, wherein said band is contoured downwardly to form a band corner portion that directly connects to the floor structure at each corner of said tray, and wherein an uppermost edge of the corresponding band corner portion is an uppermost surface of the wall structure at the corresponding band corner portion and wherein the upper edge of the band corner portion is below uppermost surfaces of the side and end portions.

2. The tray of claim 1, wherein each said band corner portion is formed whereby one said side portion of said band is contoured downwardly and one said end portion is contoured downwardly so as to converge together.

3. The tray of claim 2, further comprising a rib on an exterior surface of each said band corner portion, and a platform formed at a top edge of each said band corner portion to support the rib of an above-nested tray.

4. The tray of claim 1, wherein said band is contoured downwardly at an angle of approximately 50°.

5. The tray of claim 1, wherein said band is also contoured downwardly along the side of said tray to form a band side detail that connects to the floor structure at the side of said tray.

6. A low depth nestable tray of containers, said tray having a floor structure with a floor top surface, a floor bottom surface, and a plurality of container support areas on the floor top surface, wherein the improvements comprise:

a low depth wall structure comprising a plurality of columns arranged generally perpendicularly to the floor structure along the periphery of the floor structure, and further comprising a band having side and end portions spaced above the floor structure and connected to the floor structure by said columns to form a unitary construction, wherein said band includes parallel portions generally parallel to the floor structure and is contoured downwardly along the side portions between the parallel portions to form a band central portion that directly connects to the floor structure at the side portions of said tray.

7. The tray of claim 6, wherein said band central portion has a top edge for contacting and supporting a mating bottom edge of the band central portion of a like tray nested thereabove and wherein the top edge of the band central portion is the uppermost surface of the wall structure at the band central portion.
8. The tray of claim 6, wherein said band is contoured downwardly at an angle of approximately 50° to form said band central portion.
9. The tray of claim 6, wherein the band also contours downwardly to form a band corner portion attached to the floor structure.
10. The tray of claim 9, further comprising a rib formed on an exterior surface of at least one band corner portion, and a platform formed at an upper edge of a corresponding band corner portion for supporting the rib of an adjacent above-nested tray, and wherein an uppermost edge of the corresponding band corner portion is an uppermost surface of the wall structure at the corresponding band corner portion and wherein the upper edge of the band corner portion is below uppermost surfaces of the side and end portions.
11. The tray of claim 6, wherein each column has an inner column surface which projects inward, and an outer column surface which is recessed inward to receive therein the inner column surface of an adjacent below-nested tray.
12. The tray of claim 6, wherein the band has a substantially planar inner surface.

13. A low depth nestable tray for containers, having a floor structure with a floor top surface, a floor bottom surface, and a plurality of container support areas on the floor top surface, wherein the improvements comprise:

a low depth wall structure comprising a plurality of columns arranged along the periphery of the floor structure, and further comprising a band having side and end portions spaced above the floor structure and connected to the floor structure by said columns to form a unitary construction, wherein said band is contoured downwardly along the side portions to form a band side detail that directly connects to the floor surface at the side portions of said tray, and wherein an uppermost edge of the band side detail is an uppermost surface of the wall structure at the band side detail and wherein the upper edge of the band side detail at each band side detail is below an uppermost surface of the side and end portions of the band.

14. The tray of claim 13, wherein one of the side portions of the band is contoured downwardly and one of the end portions of the band is contoured downwardly so as to converge together to define a band corner portion.

15. The tray of claim 14, wherein the band corner portion is integrally attached to the floor structure at each corner of the tray.

16. The tray of claim 13, wherein each column has an inner column surface which projects inward, and an outer column surface which is recessed inward to receive therein the inner column surface of an adjacent below-nested tray.

17. The tray of claim 13, further comprising a rib formed on an exterior surface of at least one band corner portion, and a platform formed at an upper edge of a corresponding band corner portion for supporting the rib of an adjacent above-nested tray.

18. The tray of claim 13, wherein the band side detail is centrally disposed along the length of the side wall.

19. The tray of claim 1, wherein the band has a substantially planar inner surface.
20. The tray of claim 1, wherein each column has an inner column surface which projects inward, and an outer column surface which is recessed inward to receive therein the inner column surface of an adjacent below-nested tray.
21. The tray of claim 13 wherein said band side detail has a top edge for contacting and supporting a mating bottom edge of the band side detail of a like tray nested thereabove.
22. A low depth nestable tray for containers comprising:
  - a floor structure with a floor top surface, a floor bottom surface, and a plurality of container support areas on the floor top surface;
  - a low depth wall structure comprising a plurality of columns generally transverse to the floor structure and arranged along the periphery of the floor structure, and further comprising a band having side and end portions spaced above the floor structure, the band connected to the floor structure by said columns, and wherein the band is contoured downwardly to form a band corner portion that directly connects to the floor structure at each corner of the tray, wherein a top surface of the band at the band corner portion is the uppermost surface of the tray at the band corner portion to contact and support a like tray nested thereabove.
23. The tray of claim 22 wherein parallel portions of the band, generally parallel to the floor structure, extend between at least two of the plurality of columns.
24. The tray of claim 22 wherein the top surface of the band is contoured downwardly to form the band corner portion.
25. The tray of claim 22, further comprising a rib on an exterior surface of each band corner portion, the top surface of each band corner portion positioned to contact and support the rib of the above-nested tray.

26. The tray of claim 22 wherein the band includes side parallel portions and end parallel portions generally perpendicular to the side parallel portions, and wherein each band corner portion is between one of the side parallel portions and one of the end parallel portions.

27. The tray of claim 26 wherein an uppermost surface of the wall structure at each of the band corner portions is disposed below the plane of the parallel portions.

28. The tray of claim 27 wherein an uppermost surface of the band is the uppermost surface of the tray at the parallel portions and at the band corner portions.